

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BIN SUN,)
Plaintiff,)
-vs-)
ALBERTO R. GONZALES, U.S. ATTORNEY)
GENERAL, et al.,)
Defendants.)
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NO. CV-07-0180-AMJ
ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendants' Motion to Dismiss or, in the alternative, Motion for Summary Judgment (Ct. Rec. 13) and Plaintiff's Cross-Motion for Summary Judgment (Ct. Rec. 24). Defendants request an order dismissing Plaintiff's suit for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), or an order granting summary judgment in Defendants' favor because there are no genuine issues as to any material fact and Defendants are entitled to a judgment as a matter of law. (Ct. Rec. 14). Plaintiff moves for summary judgment, asserting that there is no disputed fact that Defendants failed to adjudicate Plaintiff's I-485 application within a reasonable period of time and he is thus entitled to prompt adjudication of his I-485 application. (Ct. Rec. 25).

1 **I. FACTUAL BACKGROUND**

2 On June 6, 2007, Plaintiff filed a Petition for Writ of Mandamus
3 seeking an order compelling Defendants to adjudicate his pending
4 application for adjustment of status to lawful permanent resident ("I-
5 485 application"). (Ct. Rec. 1).

6 Plaintiff is a citizen and national of China who entered the
7 United States in May 1996. (Ct. Rec. 1 at 3-4; Ct. Rec. 15 ¶ 1).
8 Plaintiff was admitted in valid B-1 nonimmigrant status. (Ct. Rec. 1
9 at 4). From March 3, 1997, though July 1, 2004, Plaintiff was in F-1
10 student status. (Ct. Rec. 1 at 4; Ct. Rec. 15 ¶ 1). In May 2004,
11 Plaintiff married a United States citizen, and, on July 1, 2004,
12 submitted an I-485 application to the United States Citizenship and
13 Immigration Services ("USCIS") for adjustment of his status based on
14 his marriage to a United States citizen. (Ct. Rec. 1 at 4; Ct. Rec.
15 ¶ 2).

16 On July 9, 2004, an FBI Name Check for Plaintiff was initiated by
17 USCIS. (Ct. Rec. 15 ¶ 6). The FBI's National Name Check Program
18 received USCIS's request for a name check on Plaintiff on July 14,
19 2004. (Ct. Rec. 15 ¶ 7). On November 15, 2004, Plaintiff and his
20 wife attended an adjustment of status interview at the USCIS Spokane
21 District Office. (Ct. Rec. 19 at 3). Plaintiff was advised that
22 action had been taken on his application, but that the background
23 check was still pending. (Ct. Rec. 19 at 3).

24 The USCIS cannot adjudicate Plaintiff's pending I-485 application
25 until all security checks are completed. (Ct. Rec. 15 ¶ 6).

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1 Plaintiff's I-485 application remains pending because the FBI has not
2 completed his name check.

3 **II. SUMMARY OF ARGUMENTS**

4 **A. Defendants' Arguments**

5 Defendants argue that the Court should dismiss Plaintiff's
6 complaint for lack of subject matter jurisdiction because jurisdiction
7 does not exist under either the Mandamus Act, 28 U.S.C. § 1361, or the
8 Administrative Procedures Act ("the APA"), 5 U.S.C. § 701, *et seq.*,
9 the two jurisdictional statutes pled in this action. (Ct. Rec. 1 ¶
10 1). Defendants assert that Plaintiff failed to meet his burden of
11 demonstrating that the Court possesses jurisdiction to entertain this
12 suit. (Ct. Rec. 14 at 6-14). Defendants alternatively request that,
13 if this Court determines it has jurisdiction, the Court should still
14 dismiss this action by granting Defendants' Motion for Summary
15 Judgment because there is no genuine dispute that the alleged delay in
16 adjudicating Plaintiff's claim is reasonable. (Ct. Rec. 14 at 15-25).

17 **B. Plaintiff's Arguments**

18 Plaintiff argues that the Court has subject matter jurisdiction
19 over his claims pursuant to the Mandamus Act (28 U.S.C. § 1361), the
20 federal question statute (28 U.S.C. § 1331), and the APA (5 U.S.C. §§
21 701 *et seq.*, 555(b)). (Ct. Rec. 19 at 6-12). Plaintiff asserts that
22 the Mandamus Act provides jurisdiction over any action in the nature
23 of mandamus to compel an officer or employee of the United States to
24 perform a duty owed to Plaintiff. (Ct. Rec. 19 at 6). Plaintiff
25 additionally asserts that, pursuant to the APA, a court may "compel
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1 agency action unlawfully withheld or unreasonably delayed." (Ct. Rec.
2 19 at 6).

3 Plaintiff agrees that this case presents no genuine issues of
4 material fact that must be resolved at trial. (Ct. Rec. 19 at 12; Ct.
5 Rec. 25 at 10; Ct. Rec. 5 at 2). However, Plaintiff argues that there
6 is no genuine issue of material fact that Defendants failed to
7 adjudicate Plaintiff's I-485 application within a reasonable period of
8 time. (Ct. Rec. 19 at 12-13; Ct. Rec. 25 at 10-11). Therefore,
9 Plaintiff filed a cross-motion for summary judgment requesting that
10 the Court issue an order granting his petition and compelling
11 Defendants to process his I-485 application. (Ct. Rec. 19 at 13; Ct.
12 Rec. 25).

13 **III. ANALYSIS**

14 **A. Defendants' Motion to Dismiss**

15 The Court cannot reach the merits of Plaintiff's Complaint unless
16 there is a basis for subject matter jurisdiction. Pursuant to Fed. R.
17 Civ. P. 12(b)(1), a district court must dismiss an action if the court
18 lacks jurisdiction over the subject matter of the suit. Fed. R. Civ.
19 P. 12(b)(1). The party seeking to invoke federal jurisdiction bears
20 the burden of establishing that jurisdiction exists. *Scott v.*
21 *Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). A complaint will be
22 dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction
23 if (1) the cause does not "arise under" any federal law or the United
24 States Constitution, (2) there is no cause or controversy within the
25 meaning of that constitutional term, or (3) the cause is not one
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1 described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186,
 2 198 (1962).

3 Similarly, Rule 12(h)(3) provides, "Whenever it appears by
 4 suggestion of the parties or otherwise that the court lacks
 5 jurisdiction of the subject matter, the court shall dismiss the
 6 action." Although Defendants are the movants, the party invoking
 7 federal jurisdiction, Plaintiff here, has the burden of showing that
 8 jurisdiction is proper. *Thornhill Publishing Co. v. General Tel. &*
 9 *Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). The court
 10 presumes a lack of jurisdiction until the party asserting jurisdiction
 11 proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 511
 12 U.S. 375 (1994).

13 **1. Mandamus Jurisdiction**

14 The Mandamus Act provides district courts with original
 15 jurisdiction in "any action in the nature of mandamus to compel an
 16 officer or employee of the United States or any agency thereof to
 17 perform a duty owed to the plaintiff." 28 U.S.C. § 1361. "[T]he
 18 remedy of mandamus is a drastic one, to be invoked only in
 19 extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*,
 20 449 U.S. 33, 34 (1980) (citing *Will v. United States*, 389 U.S. 90, 95
 21 (1967)). Mandamus is "available to compel a federal official to
 22 perform a duty only if: (1) the individual's claim is clear and
 23 certain; (2) the official's duty is nondiscretionary, ministerial, and
 24 so plainly prescribed as to be free from doubt, and (3) no other
 25 adequate remedy is available." *Kildare v. Saenz*, 325 F.3d 1078, 1084
 26 (9th Cir. 2003) (quoting *Patel v. Reno*, 134 F.3d 1078, 1084 (9th Cir.

1 1998)). Mandamus cannot be used to compel or review discretionary
 2 acts of government officials. *Nova Stylings, Inc. v. Ladd*, 695 F.2d
 3 1179, 1180 (9th Cir. 1983); *Wilmor v. Boyle*, 403 F.2d 811, 816 (9th
 4 Cir. 1968).

5 In this case, Plaintiff seeks to compel Defendants to expedite
 6 adjudication of his I-485 application. (Ct. Rec. 1 at 14).
 7 Adjudication of such applications is governed by section 245 of the
 8 Immigration and Nationality Act, codified at 8 U.S.C. § 1255. Section
 9 1255(a) provides that an alien's status "may be adjusted by the
 10 Attorney General, **in his discretion** and under such regulations as he
 11 may prescribe, to that of an alien lawfully admitted for permanent
 12 residence." 8 U.S.C. § 1255(a) (emphasis added).

13 Section 242 of the Act, codified at 1252(a)(2)(B), additionally
 14 provides that:

15 Notwithstanding any other provision of law (statutory or
 16 nonstatutory) . . . no court shall have jurisdiction to review--
 17 (i) any judgment regarding the granting of relief under section .
 . . 1255, or

18 (ii) any other decision or action of the Attorney General or the
 19 Secretary of Homeland Security the authority for which is
 20 specified under this title [8 U.S.C. §§ 1151 et seq.] to be in
 21 the discretion of the Attorney General or the Secretary of
 22 Homeland Security . . .

23 8 U.S.C. § 1252(a)(2)(B). This statutory framework puts adjustment of
 24 an alien's status within the discretion of the Attorney General and
 25 designated agencies.

26 Plaintiff does not dispute that the ultimate determination on the
 I-485 application is within Defendants' discretion.¹ (Ct. Rec. 19 at

¹The decision whether to grant or deny Plaintiff's I-485 application is discretionary. See, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) (agreeing with the Attorney General's Manual on the APA, which states that Section

1 11). Rather, Plaintiff argues that Defendants are without discretion
 2 to unreasonably delay the adjudication of his I-485 application, and
 3 that the Court has mandamus jurisdiction to expedite adjudication.
 4 (Ct. Rec. 19 at 11-12). The statutory provisions, however, contain no
 5 time limit for adjudicating I-485 applications. Likewise, the
 6 relevant regulatory framework does not impose a specified time limit
 7 on USCIS's adjudication of the application. See, 8 C.F.R. §§ 245, et
 8 seq.

9 When a person applies to USCIS for adjustment of status to lawful
 10 resident, the agency conducts several forms of security and background
 11 checks to ensure that the alien is eligible for that benefit and that
 12 he is not a risk to national security or public safety. (Ct. Rec. 15
 13 ¶ 3). The background checks include (1) an FBI fingerprint check, (2)
 14 a check against the Interagency Border Inspection System watch list,
 15 and (3) an FBI name check. (Ct. Rec. 15 ¶ 3). Neither party cites to
 16 a statute or regulation governing the pace within which these checks
 17 must be completed.

18 Plaintiff does, however, cite to section 555(b) of the APA,
 19 arguing that it imposes a "reasonable time" requirement for the
 20 adjudication of the I-485 application. 5 U.S.C. § 555(b) ("With due
 21 regard for the convenience and necessity of the parties or their
 22 representatives and **within a reasonable time**, each agency shall
 23 proceed to conclude a matter presented to it." (emphasis added)).
 24 Plaintiff argues that this "reasonable time" limitation on
 25

26 706(1) "empowers a court only to compel an agency 'to perform a ministerial or non-
 discretionary act,' or 'to take action upon a matter, without directing how it shall
 act.'").

1 adjudication is nondiscretionary, and that Defendants should be
2 compelled under the Mandamus Act to complete adjudication.

3 Many federal district courts agree that the pace at which USCIS
4 adjudicates I-485 applications is nondiscretionary. See, e.g.,
5 *Guoping Ma v. Gonzalez*, 2007 WL 1655188, at 3 (W.D. Wash. 2007); *Loo*
6 *v. Ridge*, 2007 U.S. Dist. LEXIS 17822, at 9 (E.D. N.Y. 2007) (noting
7 that adjudicating adjustment of status application is not at
8 discretion of defendants because defendants are required to do so);
9 *Razaq v. Poulos*, 2007 U.S. Dist. LEXIS 770, at 12 (N.D. Cal. 2007)
10 (mandamus jurisdiction was appropriate because "the absence of a
11 statutorily specified deadline, by itself, [does not] change[] the
12 character of the government's duty from ministerial to
13 discretionary."); *Liu Duan v. Zamberry*, 2007 U.S. Dist. LEXIS 12697,
14 at 13 (W.D. Pa. 2007) ("Although the speed of processing may be
15 'discretionary' in the sense that it is determined by choice, and that
16 it rests on various decisions that Defendants may be entitled to make,
17 it is not discretionary in the manner required by the jurisdiction-
18 stripping language of the IIRIRA."); *Yu v. Brown*, 36 F. Supp. 2d 922,
19 932 (D. N.M. 1999) ("[A]djudication must occur within a reasonable
20 time. A contrary position would permit [indefinite delay]. Congress
21 could not have intended to authorize potentially interminable
22 delays."); *Aboushaban v. Mueller*, 2006 U.S. Dist. LEXIS 81076, at 4-5
23 (N.D. Cal. 2006) (defendants have duty to adjudicate plaintiff's
24 application, and to do so within reasonable time).

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1 Other district courts have held that the statutory framework
 2 precludes judicial review of the pace at which the government reviews
 3 change of status applications. *See, e.g., Grinberg v. Swacina*, 478 F.
 4 Supp. 2d 1350, 1353 (S.D. Fla. 2007) (holding that 8 U.S.C. §
 5 1252(a)(2)(B)(ii) precludes judicial review of pace at which
 6 adjustment of status application is processed, not merely USCIS's
 7 ultimate decision on the issue); *Safadi v. Howard*, 466 F. Supp. 2d
 8 696, 698 (E.D. Va. 2006) (holding that Section 1252(a)(2)(B) precludes
 9 judicial review of any discretionary decision or action of USCIS,
 10 including pace at which adjustment applications proceed); *Jiuru Hu v.*
 11 *Chertoff*, 2007 U.S. Dist. LEXIS 40489, at 12 (E.D. Cal. 2007) (pace at
 12 which USCIS adjudicates I-485 applications is discretionary)²; *Li v.*
 13 *Chertoff*, 482 F. Supp. 2d 1172, 1178 (S.D. Cal. 2007) (finding that it
 14 had no subject matter jurisdiction to entertain plaintiff's mandamus
 15 petition because "as long as USCIS is making reasonable efforts to
 16 complete the adjudication, the pace required to complete that process
 17 is committed to USCIS's discretion.").

18 Although the Ninth Circuit has not spoken on this exact issue,
 19 this Court, and several others as indicated above (*see, supra*), finds
 20 that Defendants have a nondiscretionary duty to adjudicate Plaintiff's
 21 I-485 application within a reasonable time. Defendants can therefore
 22 be compelled by a writ of mandamus to complete adjudication. The

23
 24 ²However, in *Jiuru Hu*, the court commented that "[s]hould the USCIS refuse to take
 25 any steps whatsoever to resolve a LPR application or employ procedures such that no
 26 decision will issue, it might legitimately be said that the agency's inaction was not
 the result of an exercise of discretion at all. The agency would then not be operating
 within its statutory discretion at all but rather abdicating its statutory duty to
 adjudicate applications, and under those circumstances this court could have
 jurisdiction to review the agency's actions." *Jiuru Hu*, 2007 U.S. Dist. LEXIS 40489,
 at 12-13 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)).

1 Court thus has jurisdiction over Plaintiff's claim under the Mandamus
2 Act.

3 **2. The APA**

4 The Court likewise has authority to judicially review Defendants'
5 actions under the APA. As cited above, the APA provides that "[w]ith
6 due regard for the convenience and necessity of the parties or their
7 representatives and within a reasonable time, each agency shall
8 proceed to conclude a matter presented to it." 5 U.S.C. § 555(b).

9 Section 706(1) of the APA authorizes a court to "compel agency
10 action unlawfully withheld or unreasonably delayed." 5 U.S.C. §
11 706(1). However, a claim under § 706(1) can proceed only where a
12 plaintiff asserts that an agency failed to take a discrete agency
13 action that it is required to take. *Norton*, 542 U.S. at 64. The APA
14 explicitly exempts from judicial review those actions "committed to
15 the agency discretion by law." 5 U.S.C. 701(a).

16 As determined above, Defendants have a nondiscretionary duty to
17 adjudicate Plaintiff's application within a reasonable time. (See,
18 *supra*). Although the relevant statutes and regulations are notably
19 devoid of time limitations on adjudicating change of status
20 applications, the Court finds the "reasonable time" standard drawn
21 from Section 555(b) is a sufficient guide to review the agency's
22 action. Pursuant to the APA, in conjunction with the federal question
23 statute, Plaintiff has a right to have his I-485 application
24 adjudicated within a reasonable time. Accordingly, the Court has
25 subject matter jurisdiction over Plaintiff's claim under 28 U.S.C. §
26 1331 in conjunction with 5 U.S.C. § 555(b).

1 Defendants argue that the Court should dismiss Plaintiff's
 2 complaint for lack of subject matter jurisdiction. (Ct. Rec. 131).
 3 Contrary to Defendants' assertions, the Court possesses jurisdiction
 4 to entertain this suit under the Mandamus Act, 28 U.S.C. § 1361, and
 5 pursuant to 28 U.S.C. § 1331 in conjunction with the APA.
 6 Accordingly, Defendants' motion to dismiss Plaintiff's action for lack
 7 of subject matter jurisdiction is denied.

8 **B. Cross-Motions for Summary Judgment**

9 Defendants argue, in the alternative, that summary judgment
 10 should be entered in their favor because there is no genuine dispute
 11 that the alleged delay in adjudicating Plaintiff's claim is
 12 reasonable. (Ct. Rec. 14 at 15-25). Plaintiff moves for summary
 13 judgment, asserting that there is no dispute of fact that Defendants
 14 failed to adjudicate Plaintiff's I-485 application within a reasonable
 15 period of time. (Ct. Rec. 19 at 12-13; Ct. Rec. 25 at 10-11). The
 16 parties thus disagree as to whether the alleged delay is reasonable.

17 Summary judgment is appropriate when it is demonstrated that
 18 there exists no genuine issue as to any material fact, and that the
 19 moving party is entitled to judgment as a matter of law. Fed. R. Civ.
 20 P. 56(c). Under summary judgment practice, the moving party:

21 [A]llways bears the initial responsibility of informing the
 22 district court of the basis for its motion, and identifying those
 23 portions of "the pleadings, depositions, answers to
 24 interrogatories, and admissions on file, together with the
 25 affidavits, if any," which it believes demonstrate the absence of
 26 a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the
 nonmoving party will bear the burden of proof at trial on a

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1 dispositive issue, a summary judgment motion may properly be made in
2 reliance solely on the 'pleadings, depositions, answers to
3 interrogatories, and admissions on file.'" *Id.* Indeed, summary
4 judgment should be entered, after adequate time for discovery and upon
5 motion, against a party who fails to make a showing sufficient to
6 establish the existence of an element essential to that party's case,
7 and on which that party will bear the burden of proof at trial.
8 *Celotex Corp.*, 477 U.S. at 322. "[A] complete failure of proof
9 concerning an essential element of the nonmoving party's case
10 necessarily renders all other facts immaterial." *Id.* In such a
11 circumstance, summary judgment should be granted, "so long as whatever
12 is before the district court demonstrates that the standard for entry
13 of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.*
14 at 323.

15 If the moving party meets its initial responsibility, the burden
16 then shifts to the opposing party to establish that a genuine issue as
17 to any material fact actually does exist. *Matsushita Elec. Indus. Co.*
18 v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to
19 establish the existence of this factual dispute, the opposing party
20 may not rely upon the denials of its pleadings, but is required to
21 tender evidence of specific facts in the form of affidavits, and/or
22 admissible discovery material, in support of its contention that the
23 dispute exists. Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 586 n.
24 11. The opposing party must demonstrate that the fact in contention
25 is material, i.e., a fact that might affect the outcome of the suit
26 under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

1 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors*
 2 Ass'n

3 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is
 4 genuine, i.e., the evidence is such that a reasonable jury could
 5 return a verdict for the nonmoving party, *Wool v. Tandem Computers,*
Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

6 In the endeavor to establish the existence of a factual dispute,
 7 the opposing party need not establish a material issue of fact
 8 conclusively in its favor. It is sufficient that "the claimed factual
 9 dispute be shown to require a jury or judge to resolve the parties'
 10 differing versions of the truth at trial." *T.W. Elec. Serv.*, 809
 11 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the
 12 pleadings and to assess the proof in order to see whether there is a
 13 genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed.
 14 R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

15 In resolving the summary judgment motion, the court examines the
 16 pleadings, depositions, answers to interrogatories, and admissions on
 17 file, together with the affidavits, if any. Fed. R. Civ. P. 56(c).
 18 The evidence of the opposing party is to be believed, *Anderson*, 477
 19 U.S. at 255, and all reasonable inferences that may be drawn from the
 20 facts placed before the court must be drawn in favor of the opposing
 21 party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold,*
Inc., 369 U.S. 654, 655 (1962) (per curiam)). Nevertheless, inferences
 23 are not drawn out of the air, and it is the opposing party's
 24 obligation to produce a factual predicate from which the inference may
 25 be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-
 26 45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

1 Finally, to demonstrate a genuine issue, the opposing party "must
2 do more than simply show that there is some metaphysical doubt as to
3 the material facts. Where the record taken as a whole could not lead
4 a rational trier of fact to find for the nonmoving party, there is no
5 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation
6 omitted).

7 The parties agree that this case presents no genuine issues of
8 material fact that must be resolved at trial. (Ct. Rec. 5 at 2; Ct.
9 Rec. 19 at 12; Ct. Rec. 25 at 10). With respect to both parties'
10 Motions for Summary Judgment, the question before this Court is
11 whether there has been an unreasonable delay by Defendants in
12 processing Plaintiff's I-485 application. Here, in the Court's well-
13 formed opinion after a careful review of the record in light of
14 applicable law, there is no genuine dispute that the delay in
15 processing Plaintiff's I-485 application is not reasonable. The delay
16 occurring here is unreasonable.

17 Section 706(1) of the APA authorizes a court to "compel agency
18 action unlawfully withheld or unreasonably delayed." 5 U.S.C. §
19 706(1). Accordingly, Section 706 "leaves in the courts the discretion
20 to decide whether agency delay is unreasonable." *Forest Guardians v.*
21 *Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). The Ninth Circuit has
22 adopted a six-factor test for determining when an agency delay is
23 unreasonable under 5 U.S.C. § 706(1):

24 (1) the time agencies take to make decisions must be governed by
25 a 'rule of reason';
26 (2) where Congress has provided a timetable or other indication
of the speed with which it expects the agency to proceed in the

1 enabling statute, that statutory scheme may supply content for
 2 this rule of reason;

3 (3) delays that might be reasonable in the sphere of economic
 4 regulation are less tolerable when human health and welfare are
 5 at stake;

6 (4) the court should consider the effect of expediting delayed
 7 action on agency activities of a higher or competing priority;

8 (5) the court should also take into account the nature and extent
 9 of the interests prejudiced by delay; and

10 (6) the court need not 'find any impropriety lurking behind
 11 agency lassitude in order to hold that agency action is
 12 unreasonably delayed.'

13 *Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001) (quoting
 14 *Telecomms. Research & Action v. FCC* ("TRAC"), 750 F.2d 70, 80 (D.C.
 15 Cir. 1984) (six factors referred to as the "TRAC factors").

16 **1. First TRAC Factor**

17 The first TRAC factor requires an agency to govern decision-
 18 making with a rule of reason. Defendants argue that the FBI's "first-in,
 19 first-out" policy is deserving of deference. (Ct. Rec. 14 at 17-
 20 19). Defendants assert that Plaintiff's name check has undergone an
 21 initial electronic check and a secondary manual name search. However,
 22 Defendants indicate that because the check is identified as possibly
 23 being the subject of one or more FBI records, it is currently in a
 24 processing queue to be reviewed by an analyst who must retrieve and
 25 review the FBI records, which may be located in an FBI field office or
 26 overseas legal attache office. (Ct. Rec. 14, at 9-10 n. 1).

27 Nevertheless, Defendants fail to provide evidence confirming that
 28 Plaintiff's case has been processed in a "first-in, first-out"
 29 fashion, nor have Defendants provided any evidence as to why the FBI
 30 needs over three years to conduct a name check on Plaintiff. See,

1 *Chen v. Chertoff*, 2007 WL 2570243, at 4 (W.D. Wash. 2007) (in
 2 discussion of first *TRAC* factor, found significant that Defendants
 3 provided no evidence confirming Plaintiff's case had been processed in
 4 a "first in, first out" fashion and that FBI did not substantiate why
 5 it needed many years to conduct check).

6 **2. Second *TRAC* Factor**

7 The second *TRAC* factor requires deference to a statutory or
 8 regulatory timetable. Defendants argue that there is neither a
 9 statutory nor regulatory timetable in place for the FBI name check or
 10 USCIS's adjudication of an application to adjust status. (Ct. Rec. 14
 11 at 19-20). Defendants assert that in the absence of any statutory or
 12 regulatory guidelines, the Court should consider the factors that
 13 contribute to the backlogs faced by the FBI and USCIS. (Ct. Rec. 14
 14 at 20; Ct. Rec. 15 ¶¶ 9-17 (As a result of FBI's post-9/11
 15 counterterrorism efforts, number of FBI name checks has grown; in
 16 response to heightened national security concerns, process used to
 17 conduct name checks for USCIS was made more thorough; and, in December
 18 of 2002 and January of 2003, USCIS resubmitted 2.7 million name check
 19 requests to FBI in addition to regular submissions)).

20 However, the absence of a statutory or regulatory timetable does
 21 not mean that the agency can take an infinite amount of time to
 22 process Plaintiff's application. *Chen v. Chertoff*, 2007 WL 2570243,
 23 at 4 (W.D. Wash. 2007). Furthermore, "[a]lthough Congress has not
 24 established a mandatory time frame for the USCIS to complete the
 25 adjudication, Congress sets a normative expectation in 'The
 26 Immigration Services and Infrastructure Improvements Act of 2000' of a

1 reasonable processing time for an immigrant benefit application as no
2 more than 180 days after initial application." *Konchitsky v.*
3 *Chertoff*, 2007 WL 2070325, at 4 (N.D. Cal. 2007) (citing 8 U.S.C. §
4 1571); *Abbasfar v. Chertoff*, 2007 WL 2409538, at 3 (N.D. Cal. 2007)
5 ("8 U.S.C. § 1571 provides a meaningful standard for the pace of
6 adjudication of adjustment of status applications"); *Chen v. Chertoff*,
7 2007 WL 2570243, at 4 (W.D. Wash. 2007).

8 **3. Third and Fifth TRAC Factors**

9 The third *TRAC* factor provides that delays are less tolerable
10 when human health and welfare are at stake, as opposed to economic
11 regulation. In a case involving the delay of processing an I-485
12 application, human health and welfare are at stake. *See, Singh v.*
13 *Still*, 470 F. Supp. 2d 1064, 1069 (N.D. Cal. 2006) (finding human
14 health and welfare to be at stake in case involving delay of I-485
15 application to adjust status); *Chen v. Chertoff*, 2007 WL 2570243, at 5
16 (W.D. Wash. 2007). Defendants argue that this third factor overlaps
17 with the fifth *TRAC* factor, the nature and extent of the interests
18 prejudiced by the delay. (Ct. Rec. 14 at 20). The Court shall
19 consider both factors here.

20 Defendants characterize the prejudice to Plaintiff as mere
21 inconvenience, and point out that Plaintiff may travel abroad and work
22 within the United States during the pendency of his application. (Ct.
23 Rec. 14 at 20). Defendants emphasize that Plaintiff's interests are
24 minimal as compared to the security interests of the nation,
25 particularly in the post-9/11 era. (Ct. Rec. 14 at 20-21). Plaintiff
26 alleges prejudice by the delay due to an inability to accrue time to

1 be eligible for naturalization as a citizen of the United States.
2 (Ct. Rec. 19 at 4). Plaintiff additionally asserts that he desires to
3 travel internationally for family and personal reasons, but that he
4 has been unable to do so due to the pending status of his application.
5 (Ct. Rec. 19 at 4).

6 The prejudice to Plaintiff is more than "mere inconvenience" as
7 alleged by Defendants. The delay impacts Plaintiff's ability to seek
8 United States citizenship and all the rights and privileges attendant
9 thereto. See, *Singh*, 470 F. Supp. 2d at 1070.

10 **4. Fourth TRAC Factor**

11 The fourth TRAC factor requires the Court to consider the effect
12 of expediting delayed action on agency activities of a higher or
13 competing priority. Defendants argue that expediting delayed agency
14 action will intrude on the agency's discretion to fulfill its highest
15 priority of safeguarding the nation. (Ct. Rec. 14 at 21). Defendants
16 also contend that moving some individuals to the front of the queue
17 would simply move that group ahead of others who also had been
18 waiting, resulting in no net gain in processing. (Ct. Rec. 14 at 22-
19 23). Finally, Defendants assert that ordering Plaintiff's case to the
20 front of the line would set the precedent that more litigious
21 applicants are most likely to be given priority in processing at the
22 expense of other applicants that may have waited even longer, but may
23 not have the resources to file suit. (Ct. Rec. 14 at 23).

24 Plaintiff argues that Defendants have not asserted that he poses
25 a risk to national security, that his marriage to a U.S. citizen wife
26 is not bona fide, or that he is otherwise inadmissible for adjustment

1 of status to lawful permanent resident status. (Ct. Rec. 19 at 22).
2 To the contrary, Plaintiff asserts that he has strong positive
3 factors, including a U.S. citizen spouse, residence of long duration
4 in the U.S. and compliance with the law. (Ct. Rec. 19 at 15).
5 Moreover, an order compelling Defendants to adjudicate Plaintiff's I-
6 485 application does not leave Defendants without a remedy should
7 facts indicate Plaintiff is, in fact, a national security threat.
8 *Singh*, 470 F. Supp. 2d at 1070 (noting that a court order requiring
9 adjudication of I-485 application does not leave Respondents without a
10 remedy should facts suggest Plaintiff is a national security threat).
11 Defendants always have the option of moving to rescind the grant of
12 residency or to initiate removal proceedings if that situation were to
13 arise. Defendants have not demonstrated, with any specificity, how
14 expediting Plaintiff's application would threaten the agency's ability
15 to safeguard the nation.

16 **5. Sixth TRAC Factor**

17 The sixth and last TRAC factor notes that the Court need not find
18 any impropriety on the agency's part in order to hold that agency
19 action is unreasonably delayed. While Defendants indicate they have
20 taken comprehensive steps to reduce delays in the name check process
21 (Ct. Rec. 14 at 24), Defendants fail to demonstrate why they need over
22 three years to conduct a name check on Plaintiff, a resident of the
23 United States since 1996.

24 Defendants fail to set forth any facts specific to Plaintiff's
25 name check. "What constitutes an unreasonable delay in the context of
26 immigration applications depends to a great extent on the facts of the

1 particular case." *Gelfer v. Chertoff*, 2007 WL 902382 at 2 (N.D. Cal.
2 2007) (citation omitted). District courts within the Ninth Circuit in
3 similar cases have denied Rule 12(b)(6) motions to dismiss brought by
4 the Government where USCIS pointed to the FBI's failure to complete
5 the name check, and where there were no reasons why the application
6 was "particularly troublesome." *Gelfer*, 2007 WL 902382 at 2 (more
7 than two-year delay not reasonable as a matter of law); *see also Chen*,
8 2007 WL 2570243, at 7 (more than three year delay, without any
9 particularized explanation, is unreasonable); *Konchitsky*, 2007 WL
10 2070325, at 6 ("without a particularized explanation for the delay . .
11 . more than two year delay of plaintiff's application [is]
12 unreasonable as a matter of law"); *Liu v. Chertoff*, 2007 WL 2023548 at
13 4 (E.D. Cal. 2007) (two-and-a-half year delay not reasonable as matter
14 of law, noting absence of "a more particular explanation by Defendants
15 as to the cause of the delay," despite evidence of large volume of
16 applications received and extensive background checks required to
17 process them); *Alkenani v. Barrows*, 356 F. Supp. 2d 652, 657 n. 6
18 (N.D. Tex. 2005) (court, in dicta, suggested that "delays
19 approximating two years may be unreasonable."); *Qiu v. Chertoff*, 2007
20 WL 1831130, at 3 (N.D. Cal. 2007) (no explanation, other than pending
21 FBI name check, why application "stagnant" for three years); *Huang v.*
22 *Chertoff*, 2007 WL 1831105, at 2 (N.D. Cal. 2007) (despite national
23 security concerns and increased security checks since 9/11, more than
24 two-year delay is unreasonable as matter of law if there is no
25 particular explanation as to cause of delay); *Singh*, 470 F. Supp. 2d
26 ///

1 at 1069 (noting that "the mere invocation of national security is not
 2 enough to render agency delay reasonable *per se*.").

3 Plaintiff has waited over three years for a decision, without any
 4 particularized explanation from USCIS for the delay.³ Taking into
 5 consideration the foregoing facts and law, the Court concludes that
 6 there is no genuine dispute that the delay in processing the I-485
 7 application in this case is not reasonable, and Plaintiff is entitled
 8 to the relief he requests. (Ct. Rec. 1).

9 **IV. CONCLUSION**

10 The Court has subject matter jurisdiction over Plaintiff's claim
 11 pursuant to the Mandamus Act, 28 U.S.C. § 1361, and under 28 U.S.C. §
 12 1331 in conjunction with the APA.

13 Moreover, this case presents no genuine issues of material fact
 14 that must be resolved at trial. (Ct. Rec. 5 at 2; Ct. Rec. 19 at 12;
 15 Ct. Rec. 25 at 10). Based on the undisputed facts and evidence, the
 16 Court concludes that the delay in processing Plaintiff's I-485
 17 application is unreasonable. Accordingly, Plaintiff's Motion for
 18 Summary Judgment (**Ct. Rec. 24**) is **GRANTED** and Defendants' Motion to
 19 Dismiss or, in the alternative, Motion for Summary Judgment (**Ct. Rec.**
 20 **13**) is **DENIED**.

21 ///

22 ///

23

24 ³Plaintiff filed an I-485 application on July 1, 2004. (Ct. Rec. 15 ¶ 2). On
 25 July 9, 2004, an FBI Name Check for Plaintiff was initiated by USCIS. (Ct. Rec. 15 ¶
 26 6). The FBI's National Name Check Program received USCIS's request for a name check
 on Plaintiff on July 14, 2004, and has not yet completed this name check. (Ct. Rec.
 15 ¶ 7). On November 15, 2004, Plaintiff and his wife attended an adjustment of status
 interview at the USCIS Spokane District Office. (Ct. Rec. 19 at 3). Plaintiff was
 advised that action had been taken on his application, but that the background check
 was still pending. (Ct. Rec. 19 at 3).

Defendants are ordered to complete the adjudication of Plaintiff's pending I-485 application within forty-five (45) days from the date of this order. See, 5 U.S.C. § 706(1).

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, provide copies to counsel, **enter judgment in favor of Plaintiff and against Defendants** and **CLOSE** the file.

DATED this 15th day of November, 2007.

S/Larry M. Boyle
THE HONORABLE LARRY M. BOYLE
UNITED STATES MAGISTRATE JUDGE